FOR ARGUMENT

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 75-1069

RICHMOND UNIFIED SCHOOL DISTRICT,
RICHMOND BOARD OF EDUCATION,
and W. W. SNODGRASS,
Petitioners,

vs.

SONJA LYNN BERG, individually and on behalf of all other female employees of the Richmond Unified School District,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

I

MRS. BERG HAS NOT SUBSTANTIATED FEDERAL COURT JURISDICTION OF HER TITLE VII CLAIM

A. MRS. BERG HAS NOT DEMONSTRATED THE EXISTENCE OF "INJURY IN FACT" AT THE TIME HER EEOC CHARGE WAS FILED.

Mrs. Berg argues that she was "aggrieved" at the time of her EEOC charge was filed because she was

then a pregnant employee, potentially subject to the regulation of which she complained, without regard to enforcement of the regulation in her case. But 42 USC §2000e-5(e) specifically requires that charges of discrimination be filed after an alleged unlawful employment practice has "occurred," and places express limits on the time within which a charge may be filed after the "occurrence" by which a charging party is "aggrieved."

If the Court adopts the position advanced by Mrs. Berg, unlawful employment practices will have "occurred" simply by virtue of the existence of laws, regulations, or policies, regardless of their application. This will lead to anomalous results under the statute. There are undoubtedly laws, regulations and policies that have been on the books for many years and potentially affect the employment of women. If the existence of a policy, taken alone, is an occurrence justifying an EEOC charge, the right to file a charge will terminate one hundred and eighty days after the policy is adopted or becomes applicable. Arguably, this period of limitations will have expired as to then existing laws, regulations and policies, one hundred and eighty days after Title VII became effective. The Court should not adopt a theory of decision that will permit the period of limitations on EEOC charges to begin, or subject employers to EEOC proceedings, without the existence of an event at some identifiable time connecting the employer and the complaining party. Absent some conduct or act

by the District referable to her, Mrs. Berg's November 15, 1972, charge was speculative and hypothetical.

In further support of her EEOC charge, Mrs. Berg argues that under 42 USC §2000e-5(g), the District Courts may grant injunctive relief to prevent *threatened* violations of Title VII, and that the Act contemplates the prevention of Title VII violations as a basis for EEOC charges and adjudications. This claim cannot be squared with the language of the statute or the cited decisions. Section 2000e-5(g) requires the Court to find:

> ". . . that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . ."

There is nothing in the statute or cases which contemplates adjudication of Title VII violations which are merely threatened, without a finding of past or existing culpable conduct.

The Court can take notice that the Equal Employment Opportunity Commission and the lower Federal Courts are deluged with claims under Title VII. A rule permitting speculative EEOC charges, and compelling their processing by the EEOC and adjudication by the courts, can only dilute the capacity of those agencies to deal directly and promptly with charges that represent mature, de facto grievances.

B. THE RECORD DOES NOT SUPPORT MRS. BERG'S CLAIM THAT THE DISTRICT COURT MADE A FINDING OF IRREPARABLE INJURY ON HER MOTION FOR PRELIMINARY INJUNCTION.

In her statement of the case, Mrs. Berg asserts, with reference to the District Court's preliminary injunction:

> "The District Court grounded its order upon a finding of irreparable injury absent injunction . . . ." (Respondent's Brief, p. 6.)

Nowhere in its order granting motion for preliminary injunction (Petition for Certiorari, App. C. pp. 30-34) does the District Court make a finding of irreparable injury. The words "irreparable injury" are not so much as mentioned. Given the failure to find irreparable injury, the District Court erred in granting Mrs. Berg a preliminary injunction. (See: *Sampson v. Murray,* 415 U.S. 61 [1974].)

C. MRS. BERG HAS NOT MET HER BURDEN OF PROOF TO DEMONSTRATE FEDERAL COURT JURISDICTION UNDER TITLE VII NOTWITHSTANDING THAT HER EEOC CHARGE WAS NOT UNDER OATH.

> "If the jurisdictional allegations are challenged they must be proved, and the party invoking federal jurisdiction has the burden of proof."
>
> Wright, *Law of Federal Courts* 2d Ed., 292.

(See: *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178 (1935); *Roberts v. Lewis,* 144 U.S. 653 [1892].)

Mrs. Berg's complaint alleged jurisdiction under Title VII. (A. 5, ¶II.) This allegation was denied by the School District's answer. (A. 87, ¶II.) Notwithstanding Mrs. Berg's burden of proof with respect to the jurisdictional basis of her action, the School District introduced her EEOC charge. (A. 108-109.) (The Ninth Circuit has declined to require that compliance with the jurisdictional prerequisites be specifically alleged in Title VII cases: *E.E.O.C. v. Wah Chang Albany Corp.,* 499 F.2d 187 [9th Cir. 1974]. This rule shifts the effective burden of proof as to jurisdiction in such cases from plaintiffs to defendants. See: *Oakland Federation of Teachers v. Oakland Unified School District,* ..... F.Supp. ....., 10 FEP Cases 836 [N.D. Cal. 1975].)

Mrs. Berg's charge shows on its face that it was not under oath and not in the form required by the Commission. (42 USC §2000e-5(b)2.) It became Mrs. Berg's duty to demonstrate to the trial court any basis upon which to avoid these requirements. The School District filed and served a copy of the charge on August 13, 1973. (A. 3.) The Judgment of the District Court was not filed until December 4, 1973 (A. 4.) During this time, Mrs. Berg did nothing to remedy the defect in her charge.

Mrs. Berg's brief introduces several assertions of fact which she contends excuse her failure to meet this express statutory requirement. She alleges a promise by the EEOC which was not fulfilled. She alleges that the School District was not prejudiced by the defect in her charge. She alleges that her oath

was not material because her charge was true. None of these claims were raised before the trial court, and none are substantiated by the record in this case. In any event, given her burden of proof, and given the time that elapsed between the date that the School District made her charge a matter of record and the date of entry of judgment, the facts she alleges at this time do not excuse the defect in her charge.

D. MRS. BERG'S RESPONDING BRIEF DOES NOT SUBSTANTIATE THE NINTH CIRCUIT'S JURISDICTIONAL DECISION.

1. Mrs. Berg misunderstands the legal principles governing federal court jurisdiction.

Mrs. Berg argues:

> ". . . nowhere in Title VII did Congress state, as petitioners wish, that a preliminary injunction to prevent Title VII's violation until after the EEOC sends a letter to an aggrieved person who has filed a charge, nor that issuance of such a letter within two and one-half (2½) weeks after suit is commenced on the independent jurisdictional bases of Title VII and section 1983 requires the complaint to be dismissed and refiled, rather than being supplemented pursuant to F.R.C.P. Rule 15(d), as was ordered in the case at bar. (A. 94)." (Respondent's Brief, p. 19).

This argument presupposes that federal courts are courts of general jurisdiction and must entertain claims under federal legislation unless Congress expressly limits their powers. It is the petitioner's understanding that a different rule applies.

> "It is a principle of first importance that the federal courts are courts of limited jurisdiction. . . . They are empowered to hear only such cases as are within the judicial power of the United States, as defined in the Constitution, and have been entrusted to them by a jurisdictional grant by Congress."
>
> Wright, *Law of Federal Courts, 2nd Ed.,* 15.

> "'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined'."
>
> *Victory Carriers v. Law,* 404 U.S. 202 at 212 (1971), quoting *Healy v. Ratta,* 292 U.S. 263 at 270 (1934).

In *Nat. R.R. Passenger Corp. v. Passengers Assn.,* 414 U.S. 453 (1974), this Court ruled that when a federal statute expresses a particular mode for the exercise of federal court jurisdiction, it includes the negative of any other mode. Congress has established conditions that must be met before a private action may be instituted under Title VII. This Court has identified certain of those conditions as jurisdictional prerequisites. The decision in *Victory Carriers v. Law, supra,* shows that such jurisdictional prerequisites must be strictly respected. The decision of the Ninth Circuit in this case permits avoidance of those statutory conditions.

2. Mrs. Berg received a premature notice of her right to sue.

Mrs. Berg has argued that nothing in Title VII prohibits the Attorney General from issuing a notice

of right to sue before the statute's 180 day investigation and conciliation period has expired. But the Commission has interpreted the statute differently. Absent the dismissal of a charge, 29 C.F.R. §1601.25b(c) authorizes the charging party to demand a right to sue notice only after 180 days have passed from the date the charge was filed. The Courts have also interpreted the statute differently from Mrs. Berg. In *Occidental Life Ins. Co. v. E.E.O.C.*, ... U.S. ..... (1977), this Court stated that a private right of action does not arise until the 180 day period expressed in 42 USC §2000e-5(f)(1) has expired.

Mrs. Berg's notice was issued prematurely, in violation of both the statute and the regulation.

3. The Rule of Mollan v. Torrance should be applied in this case.

The theory adopted by the Ninth Circuit in this case, and by the decision in *Henderson v. Eastern Freight Ways,* 460 F.2d 258 (4th Cir. 1972), permits a Title VII complaint to be amended to confer jurisdiction on the basis of facts occurring after the complaint was filed. This theory is contrary to the rule expressed in *Mollan v. Torrance,* 9 Wheat. 537 (1824), and *Minneapolis & St.L.R. Co. v. Peoria & P.U.R. Co.,* 270 U.S. 580 (1926) that federal court jurisdiction depends upon the facts existing when an action is filed. The School District believes it is entitled to have the rule applied in its favor in this case, or to this Court's decision that the rule is changed.

Notwithstanding that it might be inconvenient to require that a new action be commenced when jurisdictional facts occur after the commencement of a federal court action, the District believes that result in required as a matter of policy and principle.

First, the rule in *Mollan v. Torrance* is an intelligible, certain rule, long established and followed. These are significant virtues, the value of which is recognized in this Court's decision in *American Fire & Cas. Co. v. Finn,* 341 U.S. 6 (1951).

Second, a departure from the rule will introduce material uncertainty into a fundamental area of the law. If jurisdiction can be based upon a notice received two weeks after the commencement of an action, in principle, a notice two years late will also suffice. (Compare *Spirt v. Teachers Ins. & Annuity Assn.,* 416 F.Supp. 1019 [S.D.N.Y. 1976].) The principle of decision expressed below and in *Henderson* is not limited to Title VII litigation.

Third, a departure from the rule in this case will effectively defeat the provisions enacted by Congress to encourage an administrative approach to problems of alleged discrimination under Title VII. Recognizing the great social and economic costs of litigation, this Court has historically supported the use of administrative forums for dispute resolution:

> "[It is] the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until

the prescribed administrative remedy has been exhausted."

Myers v. Bethlehem Corp., 303 U.S. 41 at 50-51 (1938).

II

THE RECORD ON MRS. BERG'S MOTION FOR SUMMARY JUDGMENT DOES NOT DEMONSTRATE INTENTIONAL DISCRIMINATION OR GENDER-BASED DISCRIMINATORY EFFECTS.

A. THE LOWER COURTS ERRONEOUSLY HELD THE SCHOOL DISTRICT'S POLICIES INVALID ON THEIR FACE

Mrs. Berg's motion for summary judgment in the District Court was limited in its factual basis.

> "By their Answer to plaintiff's Complaint defendants in the instant action have admitted every fact that is material to the establishment of plaintiff's claims under 42 U.S. Code section 2000e et seq. . . ." (A. 102.)

Insofar as Mrs. Berg's complaint alleged intentional discrimination or gender-based discriminatory effects, those allegations were denied by the answer. The District Court found that the controlling facts were not disputed and ruled in Mrs. Berg's favor as a matter of law. (Petition for Writ of Certiorari, Appendix C, pp. 39-43.) The decisions of the District Court and the Ninth Circuit were based on the EEOC guideline expressed in 29 C.F.R. §1604.10(b), and the general principle that employment policies and practices specific to pregnancy discriminated unlawfully on the basis of sex. (*Berg v. Richmond Unified School District,* 528 F.2d 1208, Petition for Writ of Certiorari, Appendix A, 1-11; *Hutchison v. Lake Oswego School District No. 7,* 519 F.2d 961, Petition for Writ of Certiorari, Appendix A, 12-29.)

The brief for the petitioners argues that in light of this Court's decisions in *General Electric Company v. Gilbert,* 429 U.S. ..... (1976); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974), and *Geduldig v. Aiello,* 417 U.S. 484 (1974); the policies of the School District were not unlawful per se. Mrs. Berg therefore had the burden of proving that those policies were a pretext for unlawful gender-based discrimination. (*General Electric Company v. Gilbert, supra.*) Mrs. Berg's responding brief does not address the argument the School District advanced as to the prima facie validity of its policies.

The amicus brief of the National Education Association attempts to substantiate the decision of the lower courts by attacking the principles of the *Gilbert* decision. The *amicus* argues that *Gilbert* should be limited to fact situations involving pregnancy coverage under disability insurance policies.

In this case, state law (Education Code §13468, see Brief for Petitioners, Appendix A, p. viii) provided limited, cumulative sick leave rights for absence due to "illness or injury." Amicus contends that disability insurance is to be distinguished from sick leave in that sick leave is an element of an employee's salary but disability insurance is not. This is a fallacious argument. The controlling law is that of contract. Under contract law, both disability insurance and

sick leave entitlements, if provided, are elements of the consideration provided for the work of an employee. In California, the relationship between a school district and its personnel is that of employer and employee, and this relationship is created by contract. The employment contracts between California school districts and their employees include applicable statutory provisions and governing board rules and regulations. (*Holbrook v. Board of Education,* 37 Cal.2d 316 at 331, 231 P.2d 853 [1951]; *Frates v. Burnett,* 9 Cal.App.3d 63 at 69, 87 Cal.Rptr. 731 [1970].) Contract rights are subject to the lawful conditions that apply when the contract is entered into. The fact that sick leave might provide different benefits than disability insurance does not justify a legal distinction in their treatment under Title VII. Sick leave is like insurance because the right to use sick leave occurs only under the conditions defined in the plan, and accrued sick leave credit is lost upon the termination of employment if the conditions under which its use is allowed do not occur. The District might have purchased disability insurance for its employees as excess coverage, inclusive or exclusive of pregnancy. Petitioner does not believe it can be credibly argued that different principles of decision under Title VII should apply as between disability insurance and sick leave programs.

B. THE RECORD DOES NOT SHOW THAT THE DISTRICT'S POLICIES WERE PURPOSEFULLY DISCRIMINATORY OR HAD A DISPARATE ADVERSE EFFECT ON WOMEN.

1. The record does not support the contentions of Mrs. Berg and amicus National Education Assocation that the School District's rights to decide a beginning leave date and to require an examination by its physician were limited to pregnant employees.

In asserting that the record in this Case demonstrates purposeful sex discrimination or a disparate impact on women, Mrs. Berg and the amicus have made claims such as the following:

> "[Petitioners] justify compulsory leave and mandatory physical examinations for the class of pregnant women . . . *and for no other class of employees.* . . ." (Respondent's Brief, p. 21, (emphasis original) see also pp. 29, 33-34.)
>
> . . .
>
> "That this policy had a disparate impact on women is, we submit, undeniable. By its very terms, it affected women only. There was no similar policy applicable to employees with any other physical impairment or illness." (Amicus Brief, p. 11, see also p. 13.)

Insofar as such claims were advanced by Mrs. Berg's Complaint (A. 11-12, ¶XIII and XIV), they were denied by the District (A. 89, ¶XIII and XIV). The affidavit of Sam Teese in opposition to the motion for preliminary injunction stated:

> "The regulations of the Richmond Unified School District provide for physical or mental examinations of teachers by a District approved physician at District expense whenever the Disamination is required for the safety or welfare

trict Superintendent concludes that such an ex- of students or school employees." (A. 50.)

Mrs. Berg's motion for summary judgment did not offer any evidence to substantiate the allegations of her complaint or to rebut the statement of Mr. Teese. Mrs. Berg filed as Exhibit B to her points and authorities in support of temporary restraining order and motion for preliminary injunction, Section 131.07 of the District's regulations, which provides that the District may require a physical examination by its own physician before granting a "health leave." (A. 75.)

Furthermore, at the time of Mrs. Berg's summary judgment motion, California law authorized school district governing boards to summarily suspend or transfer employees believed to be mentally ill; and such employees were required to submit to examination by members of a district selected panel of psychiatrists. (California Education Code §13411, renumbered §44942 effective April, 1977. See Appendix.)

Mrs. Berg's failure to introduce evidence substantiating the allegations of her complaint, the unchallenged affidavit of Sam Teese, the provisions of District Regulation 131.07, and the provisions of California Education Code §13411, demonstrate Mrs. Berg's failure to prove the proposition that the District's policies on medical examinations and the beginning date of leave were limited exclusively to pregnant, female employees.

2. The record does not support the contentions of Mrs. Berg and the National Education Association that the School District's interim maternity leave policy automatically forced pregnant women to undergo examination by its physician or forced pregnant women to begin maternity leave at a time when they were still capable of working.

Mrs. Berg and the amicus have argued:

> ". . . features of petitioners' leave policy that respondent contends . . . has discriminated . . . are (1) the compulsion upon every women to take leave at a given time, and the further compulsion upon any woman who seeks to work beyond the District's favored date to be examined by a doctor not of her own selection, but of the District's. . . ." (Respondent's Brief, p. 26; see also pp. 4, 20, 22 and 32.)
>
> ". . . the effect of petitioners' policy would be to force pregnant teachers to begin their maternity leave at a time when they are still capable of continuing to work." (Amicus Brief, p. 13; see also pp. 11 and 12.)

These arguments misconstrue the School District's policy as it was applied in Mrs. Berg's case. The Teese affidavit states that Mrs. Berg's employment could have continued beyond thirty days before her expected term if a report conforming to the policy had been received from her doctor; and that the District's claim to an examination by its own physician was contingent upon his determination after receiving her physician's report. (A. 49.)

Under the revised interim policy, the Assistant Superintendent's authority to determine a maternity leave date was conditioned by the express require-

ment that he take into account available medical information, the employee's job performance, and the interest and requirements of the district, its schools, classes, and pupils. If an employee wished to continue working beyond thirty days from the expected date of delivery, the employee was required to submit a factually detailed medical report from her own doctor. This report would have required the employee's doctor to consider the physical conditions involved in continued employment and to make a recommendation respecting continued employment, taking those factors into account, and disclosing the employee's state of health.

Although the District reserved general authority to require a medical examination by its own physician, it is pure speculation to say that this authority would have been invoked in all cases or even in Mrs. Berg's case. The detailed report required of the employee's physician was calculated to bring about agreement between the district's administrator and a pregnant employee, by informing them both of the critical facts. Nobody knows how Mrs. Berg's doctor would have responded if he had undertaken to provide a professional opinion about Mrs. Berg's continued employment, expressly taking into account the matters mentioned in the district's policy, at a time nearer than three months before her expected delivery date. Furthermore, nobody knows what Mr. Teese or Mrs. Berg would have done if her doctor had furnished an up-to-date medical report containing some factual data rather than gross conclusions.

Given the provisions of the revised interim maternity leave policy and the complete absence of any evidence as to its actual application, it is misleading for Mrs. Berg and the NEA to contend that the policy *automatically* compelled pregnant women to undergo examination by a school district physician. Absent any evidence as to the policy's application, the contention that Mrs. Berg or any other teacher would have been forced to take maternity leave when still capable of continuing to work is wholly unsubstantiated.

3. The record does not support Mrs. Berg's assertion that the School District maintained a scheme presuming that all pregnant teachers were disabled or irrational.

In her statement of the case, Mrs. Berg asserts:

> "At all times relevant hereto, petitioners maintained a dualistic scheme of treatment of pregnant teachers, presuming them to be disabled . . ." (Respondent's Brief, p. 4; see also pp. 20, 21, 22, 25, 27, 30, 32.)

To the contrary, the policy which the School District proposed to apply in Mrs. Berg's case involved neither a presumption nor a finding of disability or irrationality. The policy provided for the School District's ultimate determination of a beginning date of maternity leave, based on the individual facts presented by a pregnant employee upon her request to work later than thirty days before her estimated term. The policy identified "available medical information, the employee's job performance, and the interests and requirements of the district, its schools'

classes, and pupils" as factors applicable in determining a maternity leave date. (A. 17.)

The affidavit of Sam Teese identified the manner in which some of these factors would be applied, taking into account class schedules, vacations, semester breaks and the availability of substitute teachers. (A. 50-51.) The element of individualized consideration, the requirement that the District have specific medical information (in the first instance, from the employee's own physician), and the right to appeal an adverse decision, rule out the existence of any "presumption" necessarily acting in the case of all pregnant employees to determine when their maternity leave should begin. Disability is not mentioned in the policy, and irrationality is not mentioned in the record of this case.

4. The record does not support Mrs. Berg's assertions concerning sex-stereotyping.

Mrs. Berg argues that a "sex-stereotyped image of pregnant school employees" is "central to respondent's claim that petitioner's . . . policy . . . is sex discriminatory." (Brief for the Respondent, p. 28.) Mrs. Berg claims that the primary evidence of sex-stereotyping consists of the affidavit of Dr. Thebaut. (A. 52-56.) Mrs. Berg points out a number of statements in that affidavit to which she takes exception. But Mrs. Berg does not show, or even directly allege, that the statements contained in Dr. Thebaut's affidavit are incorrect in any respect. Mrs. Berg's charge of sex-stereotyping is misplaced. The courts are agreed that it is impermissible under Title VII to take ad-

verse employment actions against individuals based on stereotyped sex characterizations rather than individual capacities. (*Dothard v. Rawlinson*, ... U.S. ....., [1977]; *Jurinko v. Edwin L. Weigand Co.*, 477 F.2d 1038 [3rd Cir. 1973].) But the District's revised interim maternity leave policy provides for determinations based upon the facts presented by the individual pregnant employee. No court has questioned the right of an employer to obtain the facts necessary to made an informed determination concerning employment.

5. The record does not support Mrs. Berg's assertion that the District enforced its formal regulation on maternity and paternity leaves.

Mrs. Berg asserts in her Statement of the Case (Respondent's Brief, p. 2) and argues in her brief that the District enforced its formal regulation respecting maternity leave. Mrs. Berg's complaint alleged that the defendants promulgated or enforced Section 131.10 of the District regulations under which pregnant employees were required to take pregnancy leave no later than the seventh month of pregnancy, and a day of paternity leave with pay was allowed. (A. 8, 16; ¶VII and Exhibit A.) The defendants' answer admitted existence of the regulation but denied the other allegations in Paragraph VII of the Complaint. (A. 87-88; ¶VII.)

As to the seventh month leave requirement, the District had departed from its formal regulation and had adopted an interim policy before Mrs. Berg requested maternity leave. (A. 9, ¶IX and ¶X.) Mrs.

Berg did not allege that the seventh month requirement was enforced as to her. There is no allegation or showing on the record that the seventh month policy was enforced as to anybody else. There is likewise no showing on the record that the paternity leave regulation was enforced.

C. MRS. BERG'S SUMMARY JUDGMENT MOTION DID NOT MAKE A SHOWING THAT ENTITLED HER TO JUDGMENT

Mrs. Berg argues that her motion for summary judgment established her right to relief and shifted the burden of proof to the District. But this case was decided below upon a premise different than that now advanced by Mrs. Berg. The District Court and the Court of Appeals believed that under 29 CFR §1604.10(b), any employment practice or policy specific to pregnancy was sex discriminatory, ipso facto. If those courts were correct it is true that upon demonstration of the policies, without more, the burden of proof shifted to the District. But in *Gilbert* this Court held that policies specific to pregnancy are not prima facie sex discriminatory. Under *Gilbert* the plaintiff must make a showing that a policy involving pregnancy is intentionally sex discriminatory or at least that such a policy in fact results in greater benefits to men than to women, to establish a prima facie case of sex discrimination.

Mrs. Berg and the amicus National Education Association have argued at length that the limited factual showing in this case supports a finding by this

Court of intentional sex discrimination or of disparate adverse effect upon women. The District has demonstrated that these arguments are predicated upon factual assertions which are not substantiated by the record.

Dated, July 28, 1977.

Respectfully submitted,

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(Appendix Follows)

APPENDIX

CALIFORNIA EDUCATION CODE

§13411 (§44942).

(a) Any certificated employee may be suspended or transferred to other duties by the governing board if the board has reasonable cause to believe that the employee is suffering from mental illness of such a degree as to render him incompetent to perform his duties.

(b) The governing board shall forthwith, upon any suspension or transfer hereunder, give to the employee a written statement of the facts giving rise to the board's belief, and an opportunity to appear before the board within 10 days to explain or refute the charges.

(c) If, after the employee's appearance before the board, the board decides to continue the suspension or transfer, or if the employee chooses not to appear before the board, the employee shall then be offered, in writing, the opportunity of being examined by a panel of three psychiatrists selected by him from a list of psychiatrists to be provided by the board. To assist the panel in making their determination, the governing board shall supply to the panel, prior to the date scheduled for the psychiatric examination, a list of the duties of the position from which the employee was suspended or transferred. The employee shall continue to receive his regular salary and all other benefits of employment during the period dating from his suspension to the filing of the report of the panel with the governing board.

(d) The psychiatric examination shall be conducted at school district expense within 15 days of any suspension or transfer ordered hereunder. The employee shall submit to the examination, but shall be entitled to be represented by a psychiatrist or physician of his own choice, and any report of the psychiatrist or physician selected by him shall be filed with the panel at the request of the employer.

A written report of the panel on the examination of the suspended or transferred employee shall be submitted to the governnig board within 10 days after completion of the examination. A copy shall be supplied to the employee upon request. The report shall contain a finding on whether the employee is suffering from mental illness of such a degree as to render him incompetent to perform his duties.

(e) If a majority of the panel conclude that the employee should be permitted to return to his duties, no written record of the suspension or of the determination of the panel shall be retained, and in all respects any written record concerning the employee shall appear as it did before the suspension was made.

(f) If a majority of the panel find in their report that the employee is suffering from mental illness of such a degree as to render him incompetent to perform his duties, the governing board may, upon receipt of the report, place the employee on mandatory sick leave of absence. Any mandatory sick leave of absence imposed under this section shall not exceed two years, during which period the employee shall be entitled to sick leave, hospital and medical benefits

which he accrued during his employment by the governing board but only to the extent of such accrual.

(g) Any employee placed on mandatory sick leave of absence pursuant to this section may in writing immediately demand a hearing. Thereupon the governing board shall file a complaint in the superior court of the county in which the school district or the major part thereof is located, setting forth the charges against the employee and asking that the court inquire into the charges and determine whether or not the charges are true, and if true, whether they constitute sufficient grounds for placing the employee on mandatory sick leave of absence, and for a judgment pursuant to its findings.

(h) If the court finds that the employee was not at the time of the suspension incompetent to perform his assigned duties and should not have been placed on mandatory sick leave of absence, the employee shall be immediately reinstated to the same or a substantially similar position with full back salary, and any written record of the suspension or transfer or any report of the panel shall be destroyed.

(i) If the court confirms the placing of the employee on mandatory sick leave, or if the employee does not seek a hearing, then upon written request of the employee made not earlier than six months nor later than two years after the date he was placed on mandatory sick leave of absence, a new panel of three psychiatrists shall be convened by, and at the expense of, the governing board to review its original conclusion. If the original conclusion is not

changed by the new panel as a result of such review, the employee shall be continued on the mandatory sick leave of absence except that when the employee's total period of absence exceeds two years, the governing board shall either rescind its action and reinstate the employee to the same or a substantially similar position, or shall serve the employee with a notice of intention to dismiss him, and proceed according to Section 13412.

(j) If a majority of the new panel concludes in its report, or any subsequent review thereof, that the suspended employee or employee on mandatory sick leave of absence should be permitted to return to his duties, or if the court so concludes, the governing board shall take immediate action to restore the employee to the position from which he was suspended or transferred or to a substantially similar position.

(k) Every hearing and action by or before the governing board pursuant to this section shall be in executive session, and no decision, action, or occurrence therein shall be made public, unless the employee so requests in writing.

(l) Nothing in this section shall be construed to supersede Section 13443.